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Possible future work in the area of online dispute resolution

Proposal by Israel

Note by the Secretariat

In preparation for the forty-eighth session of the Commission, the Government of Israel submitted to the Secretariat a proposal in support of future work in the area of online dispute resolution. The proposal was submitted to the Secretariat on 12 June 2015. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

Over the last few years, substantial efforts have been made by UNCITRAL Working Group III to develop Online Dispute Resolution (ODR) Rules for online cross-border B2C and B2B transactions. The key issue revolved around the scope of application of the ODR Rules, specifically: whether and how the "arbitration" stage in the Rules can or should apply to B2C disputes where the consumer's home jurisdiction does not recognize pre-dispute arbitration agreements by consumers, and what alternative, if any, would be appropriate. Legal questions surrounding this issue have not yet been resolved and it is unclear whether such resolution is achievable in the near future. Various proposals have been put forward, ranging from limiting the scope of the ODR Rules to closing the Working Group altogether.

While the impasse at the Working Group persists, the need to provide a coherent, fair and efficient legal framework for B2C and B2B cross-border online transactions remains highly relevant, as the volume of cross-border online transactions continues to grow.[1] While acknowledging the continued relevance of proposals for ODR Rules still on the table and the work achieved so far by the Working Group, a new approach is warranted in order to address this need. Therefore, rather than terminate the activities of the Working Group or revert again to the Working Group for deliberation on the outstanding issues, it is suggested to shift the focus away from the ODR Rules and to direct the Working Group's efforts to one or more aspects of online dispute resolution other than procedural ODR Rules.

To that effect, and without precluding other possible areas of work for the Working Group, it is proposed that the Commission, at this time, instruct the Working Group to develop a non-binding instrument for use by ODR providers and neutrals in order to assist and support ODR practitioners. This instrument could address various agreed-upon issues, both with respect to the general functioning of ODR providers (independence, transparency, selection of qualified neutrals, etc.) and to case management (roles and responsibilities of neutrals, handling of evidence, communication with the parties, etc.). By enhancing the reliability, impartiality and efficiency of ODR proceedings, such an instrument would contribute to the protection of the businesses and consumers involved. The instrument could draw from previous deliberations of the Working Group on this matter, as well as from the input of leading practitioners in the field.

As with existing instruments that cover comparable matters, such as the UNCITRAL Notes on Organizing Arbitral Proceedings,[2] this instrument would make clear that it does not impose any legal requirement or substantive norms binding on ODR administrators, providers, neutrals or the parties to the dispute. An ODR provider or neutral could refer to this instrument at its discretion and to the extent it sees fit, using it as a practical toolkit for developing appropriate internal mechanisms and handling ODR cases. In addition, this instrument could enable ODR providers to signal their commitment to applying a non-exclusive set of

[1] UNCTAD, Information Economy Report 2015 – Unlocking the Potential of E-Commerce for Developing Countries (http://unctad.org/en/PublicationsLibrary/ier2015_en.pdf), p. 30.

[2] Revision of UNCITRAL Notes on Organizing Arbitral Proceedings, United Nations Doc. A/CN.9/WG.II/WP.187.

recommended practices endorsed by UNCITRAL, which is recognized as the core legal body of the United Nations in the field of international trade law.

Such an instrument would not purport to resolve the complex scope of application and choice of law questions that were raised in the course of discussions regarding the ODR Rules and would therefore steer clear from the differences in approach concerning B2C disputes, including in regards to arbitration and non-binding recommendations.

As such, the mandate to develop this instrument would allow the Working Group to address the use of ODR in B2C and B2B cross-border transactions more generally, and would enable UNCITRAL to provide a coherent framework for an important and rapidly emerging field of activity. In essence, despite the shift in emphasis, this would merely present a different application of the original mandate of the Working Group.[3]

It should be noted that pursuing this suggested direction would not preclude revisiting the possibility of working on ODR Rules in the future.

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[3] Report of the United Nations Commission on International Trade Law, 43rd session, United Nations Doc. A/65/17, para. 257. The mandate, determined in 2010, reads as follows: "*After discussion, the Commission agreed that a working group should be established to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions, including business-to-business and business to-consumer transactions. It was also agreed that the form of the legal standard to be prepared should be decided by the working group after further discussion of the topic.*"